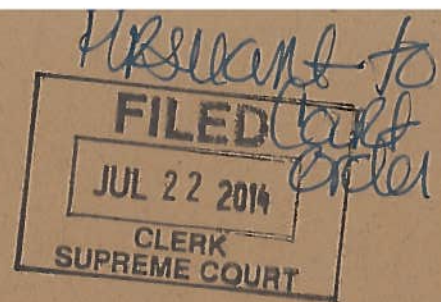


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2013-SC-00828-TG



ANN BAILEY SMITH,  
CHIEF JUDGE, JEFFERSON DISTRICT COURT,

APPELLANT

VS.

Appeal from Jefferson Circuit Court,  
Hon. Judith McDonald-Burkman, Judge  
No. 13-CI-003689

COMMONWEALTH OF KENTUCKY,  
EX. REL. MICHAEL J. O'CONNELL,  
JEFFERSON COUNTY ATTORNEY,  
AND  
TIMOTHY HIGGINS,

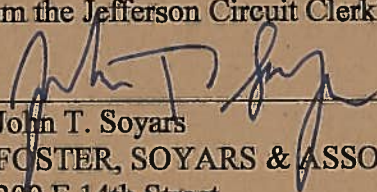
APPELLEES

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*AMICI CURIAE* BRIEF FOR  
KENTUCKY ASSOCIATION OF CIRCUIT COURT CLERKS, AND  
THE INDIVIDUAL KENTUCKY CIRCUIT COURT CLERKS SHOWN ON THE  
FOLLOWING PAGE

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The undersigned certifies that a true and accurate copy of this Brief has been served on this the 1st day of July, 2014, by mailing, United States Mail, First Class, postage prepaid, to: Hon Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; Hon. David Sexton, Assistant County Attorney, Jefferson County Attorney's Office, Fiscal Court Building, 531 Court Place, Ste. 900, Louisville, Kentucky 40202, ATTORNEY FOR COMMONWEALTH; Hon. J. Bruce Miller, 325 West Main Street, 20th Floor, Louisville, Kentucky 40202, ATTORNEY FOR APPELLEE HIGGINS; Hon. Virginia Hamilton Snell, Hon. Deborah H. Patterson, Hon. Sarah Veeneman, WYATT, TARRANT & COMBS, LLP, 2800 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202, ATTORNEY FOR APPELLANT. The undersigned further certifies that he has not removed the record from the Jefferson Circuit Clerk's Office.

  
John T. Soyars  
FOSTER, SOYARS & ASSOCIATES  
209 E 14th Street  
Hopkinsville, Kentucky 42240-3536  
(270) 886-1272  
ATTORNEY FOR *AMICI CURIAE*

THIS *AMICI CURIAE* BRIEF IS SUBMITTED ON BEHALF OF THE KENTUCKY ASSOCIATION OF CIRCUIT COURT CLERKS, AND THE FOLLOWING INDIVIDUAL KENTUCKY CIRCUIT COURT CLERKS, WHOSE COUNTY IS SHOWN IN PARENTHESES: GLENDA RANSOM (McCRACKEN); MELISSA GUILL (CRITTENDEN); LINDA AVERY (CALLOWAY); STEPHANIE KING-LOGSDON (McLEAN); SUSAN TIERNEY (DAVIESS); LORETTA CRADY (HARDIN); DIANE THOMPSON (NELSON); ROGER SCHOTT (LAUREL); GREG HELTON (KNOX); DAVID NICHOLSON (JEFFERSON); JONI TERRY (BOYLE); DARLENE SNYDER (MADISON); DIANNE MURRAY (BOONE); JOHN MIDDLETON (KENTON); RICK RASH (OLDHAM); DOUG HALL (FLOYD); AND DEBBI SPARKS (WOLFE).

## INTRODUCTION

This is an appeal from the issuance of a writ of mandamus by the Jefferson Circuit Court against Appellant Hon. Ann Bailey Smith, Judge, Jefferson District Court, ordering Judge Smith to dismiss the speeding citation received by Appellee Timothy J. Higgins, who had completed the traffic safety program operated by the Appellee Jefferson County Attorney. Judge Smith had declined to dismiss Mr. Higgins' citation without the payment of court costs, and the writ requires her to do so. The requirement that a participant in county attorney operated traffic safety programs pay court costs is not feasible, and to do so would make such programs cost prohibitive. These programs are important sources of revenue for both the county attorneys and circuit court clerks, each of whose offices receives a portion of the proceeds, and this Court should not require the imposition of court costs on the participants in such programs.

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## PURPOSE OF BRIEF AND ISSUES TO WHICH IT IS ADDRESSED

Pursuant to CR 76.12(4)(e), the Kentucky Association of Circuit Court Clerks (“the Association”) respectfully states that the purpose of this amicus curiae brief is to support the position of the Appellee Jefferson County Attorney Michael O’Connell and that of the Kentucky County Attorneys’ Association, and the 66 individual county attorneys throughout the state who operate traffic safety programs pursuant to KRS 186.574(6), and thereby provide revenue both to their own offices and to help fund the increase in salaries of deputy clerks in all counties. The circuit clerks fully support the Order dated November 15, 2013, issued by Hon. Judith E. McDonald-Burkman, Judge, Jefferson Circuit Court, granting the petition of the Jefferson County Attorney for a writ of mandamus, Apx. A, and request that this Court affirm the Order of the Jefferson Circuit Court in its entirety.

## COUNTERSTATEMENT OF THE CASE

Real Party in Interest Timothy J. Higgins (“Higgins”) received a speeding citation on March 1, 2013, in Jefferson County, Kentucky. [Appellant’s Appendix<sup>1</sup> “Apx.” L) The office of Jefferson County Attorney Michael O’Connell (“Jefferson County Attorney’s Office,” or “JCAO”) has implemented a program pursuant to KRS 186.574(6), under which qualifying offenders are offered the option of paying a \$150 fee and taking an online traffic safety program. Higgins was placed in this program, and completed it successfully. Upon the completion of this program, called Drive Safe Louisville (“DSL”), the county attorney moves for the dismissal of the ticket. The offender is not required to plead guilty to the offense, and because the citation has been

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<sup>1</sup> In the absence of a certified record in this matter, all citations to the record refer to the Appendix filed with the Appellant’s Brief.

dismissed, no court costs are sought by the JCAO or collected by the Jefferson Circuit Clerk. Circuit Court Opinion, Apx. A.

Jefferson District Judge Ann Bailey Smith (“Judge Smith”) denied the motion of the JCOA to dismiss Higgins’ citation without conditioning that dismissal on the payment of court costs. District Court Opinion, Apx. B. The JCOA, as Petitioner, and Higgins, as Real Party in Interest, filed a Petition for Writ of Prohibition and/or Mandamus in the Jefferson Circuit Court, seeking a writ of mandamus ordering that Judge Smith dismiss Higgins’ citation without the payment of court costs. Circuit Court Opinion, Apx. A. On November 15, 2014, Hon. Judith E. McDonald-Burkman (“Judge McDonald-Burkman”) entered an order granting the Petition, and issuing a writ of mandamus, concluding:

Therefore, after a careful review of the record, applicable law, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that the Petitioners’ petition for a Writ of Prohibition and/or Mandamus is GRANTED. The Jefferson District Court shall dismiss the citations of Drive Safe Louisville participants upon successful completion of the program and motion of the Jefferson County Attorney’s Office, without the payment of court costs, unless there exists articulable reasons for denial.

Order, 11/15/13, Apx. A.

On December 10, 2013, Judge Smith appealed to the Kentucky Court of Appeals from the November 15, 2013, Order of Judge McDonald-Burkman. On December 27, 2013, the Kentucky Court of Appeals entered an Order stating in relevant part:

The dispute between the Jefferson District Court and Jefferson County Attorney over the imposition of court cost has attracted significant media attention, confirming that it is a matter of public interest. In sum, an expeditious resolution of this controversy by the Kentucky [sic] Supreme Court of Kentucky would appear to be in the interest of the taxpayers and drivers of the Commonwealth. The Court of Appeals respectfully recommends transfer of this appeal to the Kentucky Supreme Court for resolution.



Order, Kentucky Court of Appeals, 12/27/13, Apx. C.

On April 17, 2014, this Court entered an order granting the Court of Appeals' recommendation and transferring this appeal to this Court. Supreme Court Order, 4/17/2014, Docket Entry No. 8 on Supreme Court Docket.

As set forth below, it is the position of the Kentucky Association of Circuit Court Clerks and its member Kentucky circuit court clerks that Judge McDonald-Burkman's Order is correct in all respects, and that this Court should affirm it in its entirety, and by so doing establish a precedent concerning the operation of traffic safety programs by county attorneys. These programs are significant sources of revenue to these offices, and provide an educational service to offending motorists.

#### ARGUMENT

I. JUDGE McDONALD-BURKMAN'S ORDER IS CORRECT IN ALL RESPECTS, AND THIS COURT SHOULD AFFIRM IT IN ITS ENTIRETY.

The decision to grant or to deny a writ is reviewed for abuse of discretion, but legal conclusions or interpretations of statutes are reviewed de novo. *Hoskins v. Maricle*, 150 S.W.3d 1, 5 (Ky. 2004) Judge McDonald-Burkman's analysis of the law is set forth beginning at p. 2 of her Order. Apx. A, p. 2:

Court costs in District Court are imposed "against a defendant[,] upon conviction in a case . . ." KRS 24A.175. A dismissal is not a conviction, and merely being named defendant in a criminal case does not suffice. . . . court costs should not be assessed against a defendant whose case has been dismissed. The exception, however, is for dismissals under pretrial diversion programs. KRS 533.250(1)(f) requires a defendant to plead guilty as a condition of pretrial diversion. The defendant is considered convicted at that time and subject to court costs. Pretrial diversion is not a sentencing alternative; it is an interruption of the prosecution prior to the final disposition of the case. *Commonwealth v. Derringer*, 386 S.W.3d 123 (Ky., 2012). If the defendant successfully completes the pretrial diversion program, the charges are listed as "dismissed-diverted" on his

record, which is not considered a criminal conviction at that time. Id.; KRS 233.258.

Order, Jefferson Circuit Court, 11/15/13 Apx. A, at p. 2.

In her analysis, Judge McDonald-Burkman refers to criminal diversions under KRS 533.250(1), which require the defendant to enter a guilty plea before proceeding with the diversion program<sup>2</sup>. This statute applies only to Class D felonies; R.Cr. 8.04 also provides for the operation of a pre-trial diversion program, and does not require the entry of a guilty plea by a participant prior to proceeding<sup>3</sup>. Because KRS 533.250(1) applies only to Class D felonies, any traffic citation that would qualify for the county attorney's traffic safety program would NOT fall within the ambit of KRS 533.250(1). To the extent that such citations were dismissed as a result of a diversion under R.Cr. 8.04, no court costs would be assessed, AND no fee would be collected by either the county attorney nor the circuit clerk.

Judge McDonald-Burkman then goes on to distinguish the traffic safety schools operated by county attorneys from traditional diversion programs:

The Kentucky General Assembly recently enacted KRS 186.574(6), which authorizes county attorneys to operate traffic safety programs "prior to the adjudication of the offense." Unlike state traffic school, it is not a sentence imposed by the judge or by the defendant voluntarily pleading guilty and choosing traffic school in lieu of fines and penalties such as points against one's driver's license. KRS 186.575(5) specifically requires the payment of court costs for persons attending state traffic school. No similar language appears in subsection (6).

Order, Jefferson Circuit Court, 11/15/13, Apx. A, at p. 3.

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<sup>2</sup> KRS 533.250(1)(f) provides that, "Any person shall be required to enter an Alford plea or a plea of guilty as a condition of pretrial diversion[.]"

<sup>3</sup> R.Cr. 8.04(1) provides that, "The attorney for the Commonwealth and the defendant may agree, subject to the approval of the trial court, that the prosecution will be suspended for a specified period after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties. The agreement (or any mutually agreed upon subsequent modifications to the agreement) must be in writing and signed by the parties."



As Judge McDonald-Burkman points out, the fundamental difference between a county attorney traffic safety program and state traffic school is that in order to qualify to attend state traffic school, one must pay court costs, these conditions were not imposed by the legislature on county attorney-operated traffic safety programs. As Judge McDonald-Burkman goes on to explain:

“Prior to adjudication” suggests the General Assembly intended for relatively minor traffic violations to be disposed of early in the case proceedings, before any weighing of evidence by the Court. Adjudication may or may not result in a finding of guilt. Accordingly, the traffic safety program was not intended to be an alternative sentence such as state traffic school or a pretrial diversion program as no finding of guilt is a required condition for participation. While not binding on this Court, the letters from the Attorney General’s Office and State Representative Robert Damron, co-sponsor of House Bill 480 which established the amendment to KRS 186.574, are persuasive in demonstrating the intent of the General Assembly and interpretation of the statute(s) in question. The District Court’s conditioning dismissal of Drive Safe Louisville participants’ citations on the payment of court costs is erroneous.

Id., Apx. A.

KRS 446.080(1) provides that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.” In interpreting the phrase “prior to adjudication” as ultimately precluding the requirement that court costs be assessed, the Circuit Court recognized that under KRS 446.080, a court must give full effect to the intent of the legislature while interpreting statutory language in the context of its subject matter:

In construing statutes, we must give effect to the intent of the General Assembly. *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky.2012). “We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.” Id. (citing *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky.2006)).

*Com. v. Johnson*, 423 S.W.3d 718, 721 (Ky. 2014)

The Jefferson Circuit Court’s interpretation of the statute is also proper under the rule that “a statute should be construed, if possible, so that no part of it is meaningless and ineffectual.” *Hardin County Fiscal Court v. Hardin County Bd. of Health*, 899 S.W.2d 859, 862 (Ky.App. 1995) (citing *Brooks v. Meyers*, 279 S.W.2d 764 (Ky. 1955))

Construing the statute to require court costs effectively renders the phrase “prior to adjudication” meaningless; as Judge McDonald-Burkman held, the payment of court costs always implies either an adjudication by the court that a party is guilty, or that party’s entry of a guilty plea. The clear intent of the statute, as she found, was that the county attorney is given the option of offering a traffic safety program prior to either form of adjudication. Because there has been no adjudication, there are no court costs.

Although she does not articulate her ruling using this language, Judge McDonald-Burkman’s opinion recognizes that in the context of routine criminal procedure – the diversions, plea bargains, and routine dismissals that make up criminal law in District Courts throughout Kentucky – there is a tension inherent in the exercise of judicial discretion by the judge and prosecutorial discretion by the County Attorney. This is fundamentally an issue of separation of powers; in a case cited by Judge McDonald-Burkman in her Order, this Court wrote, “As we noted in *Hoskins*, and as the Court of Appeals observed in its decision in this case, our state Constitution specifically articulates the doctrine of separation of powers.” *Gibson v. Com.*, 291 S.W.3d 686, 689 (Ky. 2009) Judge McDonald-Burkman concluded her Order by holding that the JCOA could not simply stamp “dismissed” on the citation or case jacket, but was required to make a motion to dismiss the citation. She held that upon the JCOA’s making of such a motion to dismiss, the District Court is required to dismiss the citation “unless there exists

articulable reasons for denial.” In using the phrase “articulable reasons,” Judge McDonald-Burkman was echoing the language used by this Court in the *Hoskins* case referred to in *Gibson* in context of a plea bargain:

Thus, although a court may not adopt a categorical policy to reject all charge (or hybrid) bargains, *Miller*, 722 F.2d at 564–65, its discretion to accept or reject such an agreement is limited only by the requirement that it independently review each bargain placed before it, and set forth in the record both the prosecutor's reasons for forming the bargain and the court's justification for rejecting it. *Id.* at 566 (citing *United States v. Ammidown*, 497 F.2d 615, 623 (D.C.Cir.1973)). “[R]equiring district courts to articulate a sound reason for rejecting a plea is the surest way to foster the sound exercise of judicial discretion.” *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir.1990). We agree.

*Hoskins v. Maricle*, *supra* at 24.

As this Court did in *Hoskins*, Judge McDonald-Burkman has fashioned a compromise between the prosecutorial discretion necessary to allow the county attorney to perform the duties of his office, and the judicial discretion necessary to allow the District Judge to oversee each case. Without sensible, practical, rules like the ones articulated by the Jefferson Circuit Court here, there could be no routine handling of minor criminal cases.

The Order of the Jefferson Circuit Court is correct in all respects, and provides a clear and workable framework for the operation of a traffic safety program by county attorneys. This Court should affirm it in its entirety.

## II. THE REQUIREMENT OF THE IMPOSITION OF COURT COSTS WOULD MAKE THE COUNTY ATTORNEYS’ TRAFFIC SAFETY PROGRAM COST PROHIBITIVE.

In authorizing county attorneys to provide a traffic safety program, the General Assembly recognized that one function of the program was to raise revenue for the operation of the offices of county attorney and circuit clerk. KRS 186.574(6)(c) and (d)

provide:

(c) A county attorney that operates a traffic safety program:

1. May charge a reasonable fee to program participants, *which shall only be used for payment of county attorney office operating expenses*; and

2. Shall, by October 1 of each year, report to the Prosecutors Advisory Council the fee charged for the county attorney-operated traffic safety program and the total number of traffic offenders diverted into the county attorney-operated traffic safety program for the preceding fiscal year categorized by traffic offense.

(d) Each participant in a county attorney-operated traffic safety program shall, in addition to the fee payable to the county attorney, pay a twenty-five dollar (\$25) fee to the court clerk, which shall be paid into a trust and agency account with the Administrative Office of the Courts and is *to be used by the circuit clerks to hire additional deputy clerks and to enhance deputy clerk salaries*. [Emphasis supplied]

The statute allows the county attorneys to set the fee charged for their program, and mandates that revenues generated thereby be used solely for county attorney office expenses. The statute mandates that, in addition to the fee charged by the county attorney, a fee of \$25 be paid to the circuit clerk. In so providing, the legislature recognized that the legislative budget for years has not provided one dollar for office operating expenses for county attorneys, and has not provided any additional funding to the county attorneys during the past two biennial budget cycles. (2010-12<sup>4</sup>, and 2012-14<sup>5</sup>). The state budget has not provided meaningful appropriations for deputy circuit clerks during this time. The legislature recognized these budgetary shortfalls when it adopted the traffic safety legislation which specifically and exclusively established fees to fund the operating expenses of county attorneys and supplement the woefully underpaid deputy circuit clerks. In the Kentucky Attorney General's official 2013 Biennial Report, for the period

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<sup>4</sup> 2010 House Bill 1

<sup>5</sup> 2012 House Bill 265

2012-13, states, at. p. 31:

During this biennium, Kentucky's prosecutors have continued to represent the Commonwealth of Kentucky in combating crime, despite continued funding challenges. During this time, there have been no staff salary budget increases, and supply, travel and postage budgets have been cut or eliminated for all the offices of the 177 County and Commonwealth's Attorneys. Additionally, expert witness budgets have been cut and the operating budgets of the County Attorneys were cut in Fiscal 2013 and eliminated in Fiscal 2014.

Due to inadequate general funds, when replacing employees, the PAC was forced to continue mandatory vacancy periods of 30 days for County Attorneys and 60 days for Commonwealth's Attorneys, which began in Fiscal Year 2012 while caseloads continued to rise and statutory demands continued to increase.

Attorney General's 2013 Biennial Report, p. 31, available at [http://ag.ky.gov/biennial\\_reports/agbiennialreport2013.pdf](http://ag.ky.gov/biennial_reports/agbiennialreport2013.pdf)

On November 13, 2013, the Prosecutors Advisory Council issued its annual report on traffic safety programs operated by county attorneys for the 2013 fiscal year. The report contains a list of Kentucky counties, specifying for each county whether that county operates such a program, and if so, how many offenders were placed in the programs. The 2013 report shows that of Kentucky's 120 counties, 66, more than half, operate such programs. Prosecutors Advisory Council October 2013 Report, Available at <http://dpa.ky.gov/NR/rdonlyres/3C9C644D-EB64-453F-B427-DCB12E83E1A8/0/CountyAttorneyTrafficSafety.pdf>

The report reveals that a total of 18,278 people have participated in these 66 programs, for an average of 277 people per county. Id. KRS 186.374(6)(d) requires that a \$25 per person fee be paid to the circuit clerk, "which shall be paid into a trust and agency account with the Administrative Office of the Courts and is to be used by the circuit clerks to hire additional deputy clerks and to enhance deputy clerk salaries." At

\$25 per person, 18,278 participants paid a total of \$456,950 to the 66 circuit clerks, or an average of \$6,923 per circuit clerk. However, all 120 counties receive a benefit, because the deputy clerks in all counties benefit from the funds generated by the program.

Had each of these cases been adjudicated and the offender found guilty, court costs in a much larger amount would have been collected on those cases in which the offender was found guilty; however, to the extent that these citations, or some portion of them, would have been dismissed voluntarily by the prosecution, or have resulted in a not-guilty verdict, no court costs would have been assessed, nor would either the county attorney nor the circuit clerks received any revenue from them. Court costs are divided as required by KRS 42.320, with 49% of the revenue paid to the Commonwealth's General Fund<sup>6</sup>. Of the remaining 51%, only 5% "shall be paid into a trust and agency account with the Administrative Office of the Courts and is to be used by the circuit clerks to hire additional deputy clerks and to enhance deputy clerk salaries."<sup>7</sup> The spinal cord and head injury research fund receives 6.5% of these costs<sup>8</sup>, and the traumatic brain injury trust fund receives 5.5%<sup>9</sup>, each more than the circuit clerks, while 10.8% is earmarked for new jail construction<sup>10</sup>, and another 5.5% defrays the cost of incarceration paid by local governments<sup>11</sup>. In the *Higgins* case, the court costs improperly assessed by Judge Smith were \$134, meaning that the circuit clerk would receive the benefit of \$6.70 for deposit into its AOC account for use in hiring additional deputy clerks or enhancing the salaries of current deputies, rather than the \$25 fee provided by KRS 186.374(6). Recognizing the

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<sup>6</sup> KRS 42.430(2)(a)

<sup>7</sup> KRS 42.320(2)(e)

<sup>8</sup> KRS 42.430(2)(c)

<sup>9</sup> KRS 42.430(2)(d)

<sup>10</sup> KRS 42.430(2)(b)

<sup>11</sup> KRS 42.430(2)(j)

inadequacy of the portion of court costs which benefit the circuit clerks, the legislature has provided a dedicated exclusive fee for the county attorneys and deputy clerks.

These fees are a significant source of revenue for the circuit clerks in the 66 counties whose county attorneys have implemented a traffic safety program, as well as for those county attorneys' offices. In addition, this program fills a need not met by any other program, that of providing a minor offender an option that both gives some level of punishment through the payment of a fee that is almost as much as the total fine and court costs the offender was facing, plus providing traffic education to that offender. The offenders participating in these programs are all minor offenders, most having received low level speeding citations. Because of the minor nature of these citations, it is cost prohibitive to require the offender to pay BOTH court costs, which in the Higgins case were \$134, AND a fee that for most counties, according to the October 2013 PAC Report, exceeds \$100.


## CONCLUSION

The Kentucky Association of Circuit Court Clerks and the individual circuit clerks set forth below provide this amicus curiae brief to inform the court that they agree with the Jefferson Circuit Court's interpretation of KRS 186.574(6) in all respects. A requirement that court costs be paid by offenders in County Attorney Traffic Safety Programs would make such programs, which are necessary sources of funds for both county attorneys and circuit clerks, cost prohibitive, thereby denying the program's benefits not only to the county attorneys and circuit clerks, but also to the minor traffic offenders who benefit by being provided an educational experience rather than merely paying a fine. This Court should affirm the ruling of the Jefferson Circuit Court in all



respects.

Respectfully submitted,

  
\_\_\_\_\_  
John T. Soyars  
FOSTER, SOYARS & ASSOCIATES  
209 E 14th Street  
Hopkinsville, Kentucky 42240-3536  
(270) 886-1272

ATTORNEY FOR AMICUS CURIAE  
KENTUCKY ASSOCIATION OF CIRCUIT  
CLERKS AND THE FOLLOWING INDIVIDUAL  
KENTUCKY CIRCUIT COURT CLERKS,  
WHOSE COUNTY IS SHOWN IN  
PARENTHESES: GLENDA RANSOM  
(McCRACKEN); MELISSA GUILL  
(CRITTENDEN); LINDA AVERY  
(CALLOWAY); STEPHANIE KING-LOGSDON  
(MCLEAN); SUSAN TIERNEY (DAVIESS);  
LORETTA CRADY (HARDIN); DIANE  
THOMPSON (NELSON); ROGER SCHOTT  
(LAUREL); GREG HELTON (KNOX); DAVID  
NICHOLSON (JEFFERSON); JONI TERRY  
(BOYLE); DARLENE SNYDER (MADISON);  
DIANNE MURRAY (BOONE); JOHN  
MIDDLETON (KENTON); RICK RASH  
(OLDHAM); DOUG HALL (FLOYD); AND  
DEBBI SPARKS (WOLFE).

